



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-101

October 11, 2016

Detective Tommy Hudson, President
Little Rock Fraternal Order of Police Lodge #17
P. O. Box 34351
Little Rock, AR 72203

Dear Detective Hudson:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request is based on Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Supp. 2015). This subsection authorizes the custodian, requester, or the subject of personnel or employee evaluation records to seek an opinion from this office stating whether the custodian's decision regarding the release of such records is consistent with the FOIA.

Your correspondence indicates that a request has been made to the Little Rock Police Department ("LRPD") for multiple items regarding LRPD employees. You have received notice of the custodian of records' decision concerning the following items that have been requested: personnel information—specifically, name, race, age, gender, address, date of hire, promotion, pay, and pay increases; a listing of command officers at the captain level and above with this same personnel information; personnel files for those with the rank of lieutenant or captain; a listing of motorcycle patrol officers; all promotions and demotions that have occurred during the past two years.

The custodian of records has determined that the requested items are personnel records that are subject to release under the FOIA, with the exception of your home address, social security number, and date of birth. The custodian has also determined that any performance evaluations or disciplinary actions are not subject to release unless they formed the basis of a suspension or termination that has reached final administrative resolution.

You have asked for my opinion regarding the custodian's decision.

RESPONSE

My statutory duty is to state whether the custodian's decision regarding the release of personnel or employee evaluation records is consistent with the FOIA. That determination depends upon the content of any records that are responsive to the FOIA request and the proper application of the relevant FOIA test for disclosure. Because I have not seen any records that may be at issue, I cannot opine regarding the release of any particular records.

Based on the types of items requested, however, I can state that with the possible exception of records of promotions or demotions, the custodian has properly determined that records containing the requested information are personnel records. The custodian has also properly determined that employees' names, race, ages, gender, dates of hire, promotions, pay, and pay increases are releasable, but that home addresses, social security numbers, and dates of birth are not releasable. I can also address the general tests that apply to the release of records commonly included in personnel files. Depending upon their content and the circumstances surrounding their creation, records of promotions and demotions might be properly classified as evaluation records, which are subject to a different test for disclosure that includes—in the case of any demotions that led to suspension or termination—a determination whether there is a compelling public interest in disclosure.

DISCUSSION

I. General standards governing disclosure.

A document must be disclosed in response to a FOIA request if all three of the following elements are met. First, the FOIA request must be directed to an entity subject to the act. Second, the requested document must constitute a public record. Third, no exceptions allow the document to be withheld.

The first two elements appear met in this case. As for the first element, the documents are held by LRPD, which is a public entity. As for the second element, the FOIA defines "public record" as:

writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium, required by law to

be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.¹

In my opinion, the information and records requested are public records under this definition and must be disclosed unless some specific exception provides otherwise.

II. Exceptions to disclosure.

Under certain conditions, the FOIA exempts from public disclosure two groups of items.² For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: “personnel records”³ or “employee evaluation or job performance records.”⁴ The test for whether these two types of documents may be released differs significantly.

¹ Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2015).

² With regard to the request in this case for personnel files, this office and the leading commentators on the FOIA have observed that personnel files usually include: employment applications; school transcripts; payroll-related documents such as information about reclassifications, promotions, or demotions; transfer records; health and life insurance forms; performance evaluations; recommendation letters; disciplinary-action records; requests for leave-without-pay; certificates of advanced training or education; and legal documents such as subpoenas. *E.g.* Op. Att’y Gen. 97-368; John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 187–89* (Arkansas Law Press, 5th ed., 2009).

³ Ark. Code Ann. § 25-19-105(b)(12): “It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter.... [p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”

⁴ Ark. Code Ann. § 25-19-105(c)(1): “Notwithstanding subdivision (b)(12) of this section, all employee evaluation or job performance records, including preliminary notes and other materials, shall be open to public inspection only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.”

When custodians assess whether either of these exceptions applies to a particular record, they must make two determinations. First, they must determine whether the record meets the definition of either exception. Second, assuming the record does meet one of the definitions, the custodian must apply the appropriate test to determine whether the FOIA requires that record be disclosed.

a. Personnel-records exception.

The first of the two most relevant potential exceptions is the one for “personnel records,” which the FOIA does not define. But this office has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.⁵ Whether a particular record meets this definition is, of course, a question of fact that can only be definitively determined by reviewing the record itself. If a document meets this definition, then it is open to public inspection and copying except “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁶

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁷ has provided some guidance. To determine whether the release of a personnel record would constitute a “clearly unwarranted invasion of personal privacy,” the Court applies a balancing test that weighs the public’s interest in accessing the records against the individual’s interest in keeping them private. The balancing takes place with a thumb on the scale favoring disclosure.⁸

The balancing test elaborated by *Young v. Rice* has two steps. First, the custodian must assess whether the information contained in the requested document is of a personal or intimate nature such that it gives rise to a greater than *de minimis* privacy interest.⁹ If the privacy interest is merely *de minimis*, then the thumb on

⁵ See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

⁶ Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2013).

⁷ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁸ Watkins & Peltz, *supra* note 4, at 191.

⁹ *Id.* at 598, 826 S.W.2d at 255.

the scale favoring disclosure outweighs the privacy interest. Second, if the information does give rise to a greater than *de minimis* privacy interest, then the custodian must determine whether that interest is outweighed by the public's interest in disclosure.¹⁰ Because the exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the circumstances, his privacy interests outweigh the public's interests.¹¹ The fact that the subject of any such records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective.¹²

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹³

Even if a document, when considered as a whole, meets the test for disclosure, it may contain discrete pieces of information that have to be redacted. Some items that must be redacted include:

- Personal contact information of public employees, including personal telephone numbers, personal e-mail addresses, and home addresses (Ark. Code Ann. § 25-19-105(b)(13));
- Marital status of employees and information about dependents (Op. 2001-080);
- Dates of birth of public employees (Op. 2007-064);
- Social security numbers (Ops. 2006-035, 2003-153);
- Medical information (Op. 2003-153);

¹⁰ *Id.*, 826 S.W.2d at 255.

¹¹ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹² *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

¹³ Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

- Any information identifying certain law enforcement officers currently working undercover (Ark. Code Ann. § 25-19-105(b)(10));
- Driver's license numbers (Op. 2007-025);
- Insurance coverage (Op. 2004-167);
- Tax information or withholding (Ops. 2005-194, 2003-385); and
- Payroll deductions (Op. 98-126); banking information (Op. 2005-194).

b. Employee-evaluation exception.

The second potentially relevant exception is for “employee evaluation or job performance records,” which the FOIA likewise does not define. But the Arkansas Supreme Court has recently adopted this office’s view that the term refers to any records (1) created by or at the behest of the employer (2) to evaluate the employee (3) that detail the employee’s performance or lack of performance on the job.¹⁴ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁵

If a document meets the above definition, the document *cannot* be released unless all the following elements have been met:

1. The employee was suspended or terminated (i.e., level of discipline);
2. There has been a final administrative resolution of the suspension or termination proceeding (i.e., finality);
3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee (i.e., basis); and

¹⁴ *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; *see, e.g.*, Op. Att’y Gen. Nos. 2009-067, 2008-004, 2007-225, 2006-038, 2005-030, 2003-073, 98-006, 97-222, 95-351, 94-306, and 93-055.

¹⁵ *Id.*

4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).¹⁶

As for the final prong, the FOIA never defines the key phrase “compelling public interest.” But two leading commentators on the FOIA, referring to this office’s opinions, have offered the following guidelines:

[I]t seems that the following factors should be considered in determining whether a compelling public interest is present: (1) the nature of the infraction that led to suspension or termination, with particular concern as to whether violations of the public trust or gross incompetence are involved; (2) the existence of a public controversy related to the agency and its employees; and (3) the employee’s position within the agency. In short, a general interest in the performance of public employees should not be considered compelling, for that concern is, at least theoretically, always present. However, a link between a given public controversy, an agency associated with the controversy in a specific way, and an employee within the agency who commits a serious breach of public trust should be sufficient to satisfy the “compelling public interest” requirement.¹⁷

These commentators also note that “the status of the employee” or “his rank within the bureaucratic hierarchy” may be relevant in determining whether a “compelling public interest” exists,¹⁸ which is always a question of fact that must be determined, in the first instance, by the custodian after he considers all the relevant information.

The primary purpose of this exception is to preserve the confidentiality of the formal job-evaluation process in order to promote honest exchanges in the employee/employer relationship.¹⁹

¹⁶ Ark. Code Ann. § 25-19-105(c)(1) (Supp. 2013); Op. Att’y Gen. 2008-065.

¹⁷ Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

¹⁸ *Id.* at 216 (noting that “[a]s a practical matter, such an interest is more likely to be present when a high-level employee is involved than when the [records] of ‘rank-and-file’ workers are at issue.”).

¹⁹ *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

III. Application.

Because I have not seen any of the records that may be responsive to the FOIA request in this case, I cannot address any specific records. I can state, however, that with the possible exception of promotion or demotion records, the custodian has properly determined that records containing the items requested are personnel records. Applying the above test for the release of such records, it is my opinion that the custodian has properly decided to release employees' names, race, ages, gender, dates of hire, promotions, pay, and pay increases. As indicated above, home addresses, social security numbers, and dates of birth are not releasable. Whether additional redactions are necessary will depend upon the content of the particular records at issue, applying the above balancing test applicable to personnel records.

With regard to records of promotions and demotions, such records might be properly classified as evaluation records under the above definition. As explained above, suspension or termination is a threshold requirement under the test for the release of such records. Additionally, the test for the release of evaluation records includes—in the case of any demotions that led to suspension or termination—a determination whether there is a compelling public interest in disclosure.

Sincerely,



LESLIE RUTLEDGE
Attorney General